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OCTOBER TERM, 1970.

No. 894

THOMAS S. EISENSTADT, AS HE IS SHERIFF OF SUFFOLK COUNTY, MASSACHUSETTS,
Appellant,

v.

WILLIAM R. BAIRD,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE APPELLANT.

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Supreme Court of the United States.

October Term, 1970.

No. 804.

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,
Appellant,
v.
WILLIAM R. BAIRD,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE APPELLANT.

The Opinions Below.

The opinion of the Circuit Court of Appeals vacating the order of the District Court is reported at 429 F. 2d 1398 (1st Cir. 1970) (A. 47). The opinion of the District Court is reported at 310 F. Supp. 951 (1970) (A. 35). The opinion of the Massachusetts Supreme Judicial Court is reported at 355 Mass. 746, 247 N.E. 2d 574 (1969) (A. 17).

Jurisdiction

The civil action in the United States District Court for the District of Massachusetts was commenced by the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2241 (A. 7). After hearing, the court dismissed the petition (A. 4). Thereupon, the plaintiff (appellee herein) appealed to the United States Circuit Court of Appeals for the First Circuit (A. 12). After hearing, that court on July 6, 1970, vacated the order of the District Court and remanded the action thereto with instruction to grant the writ of habeas corpus (A. 47). Timely notice of appeal was filed with the Court of Appeals for the First Circuit on July 15, 1970 (A. 14).

Probable jurisdiction was noted by this court on March 1, 1971 (A. 6).

Statutes Involved.

The Massachusetts statutes involved are Mass. G.L. c. 272, § 21, as amended by Acts of 1966, c. 265, §.3, which provides:

> "Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprison-

ment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

And Mass. G.L. c. 272, § 21A, as inserted by Acts of 1966, c. 265, § 1, which provides:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

Questions Presented.

1. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional on its face as vague, arbitrary, discriminatory, overbroad, or lacking legitimate legislative purpose to the extent that it makes unlawful to give away to unmarried

persons medicines and other articles for the prevention of conception?

2. Is the Massachusetts statute, G.L. c. 272, §§ 21, 21A, unconstitutional as applied to the appellee, William R. Baird, who, not being a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse, was convicted for giving away certain contraceptive devices, to wit: vaginal foam, at a public lecture before an audience of approximately two thousand persons at Boston University?

Statement of the Case.

In April, 1967, William R. Baird, the appellee herein, pursuant to an invitation, addressed a group of students at Boston University. Mr. Baird is not a registered physician, a registered pharmacist actually engaged in the business of pharmacy, or a registered nurse. On a demonstration board he exhibited various contraceptive devices and at the close of his lecture he invited members of the audience, with none of whom he had any medical professional relationships, to come and help themselves. He personally handed an unmarried adult woman a package of vaginal foam. There was no evidence that he knew the woman beforehand. He was thereupon arrested and charged with exhibiting and delivering a contraceptive article (A. 6). The appellee was indicted and convicted of exhibiting and distributing contraceptive devices in violation of Mass. G.L. c. 272, § 21. On appeal, the Massachusetts Supreme Judicial Court unanimously held that the conviction for *exhibiting* contraceptive articles violated Mr. Baird's First Amendment rights. However, by a 4-3 majority, the court upheld the constitutionality of the provision against *delivering* as beyond the realm of free speech. *Commonwealth* v. *Baird*,

355 Mass. 746 (May 1, 1969) (A. 17). On January 12, 1970, the United States Supreme Court denied a petition for writ of certiorari. *Baird* v. *Massachusetts*, 396 U.S. 1029 (1970). Thereafter, a petition for writ of habeas corpus was filed in the United States District Court for the District of Massachusetts (A. 71). Following a hearing, the petition was dismissed with opinion. *Baird* v. *Eisenstadt*, 310 F. Supp. 951 (1970) (A. 35). A claim of appeal having been filed, the United States Court of Appeals for the First Circuit issued a certificate of probable cause and ordered the appellee herein released on bail (A. 13). After a hearing, the Court of Appeals entered a judgment vacating the order of the District Court and remanded the action with instruction to grant the writ of habeas corpus discharging Mr. Baird, *Baird* v. *Eisenstadt*, No. 7578 (1st Cir. July 6, 1970) (A. 47).

The appellant filed a notice of appeal to this court on July 21, 1970 (A. 14), and on March 1, 1971, this court noted probable jurisdiction (R. 6).

Argument.

I. Appellee has No Standing to Assert that the Massachusetts Statute is Unconstitutional on its Face: He Ought Not be Permitted to Question its Constitutionality in Contexts Other than that of the Precise Act for which He was Convicted.

The court below improperly concluded that appellee had standing to challenge the constitutionality on its face. Under settled views of judicial policy one ordinarily cannot assert the rights of another as a basis of a defense for an otherwise valid prosecution: *United States* v. *Raines*, 362 U.S. 17, 21; *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.* 226 U.S. 217; *LeClair* v. *O'Neil*, 307 F. Supp. 621, 624, appeal affirmed, 39, 3420 (3/30/71).

That rule has been somewhat relaxed where the accused has been charged under a broad and sweeping statute which has the effect of chilling preferred freedom safeguarded by the First Amendment. *E.g., Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507. But it had no such effect here, certainly not on the appellee, and not on others.

The statute is not by its terms directed towards freedoms of speech, press, petition or assembly, enumerated in the First Amendment. When such freedoms are involved an accused has standing to raise the issue of overbreadth unless he participated in that sort of "hard-core" conduct which the state obviously could constitutionally prohibit; conversely, if a statute by its terms is directed primarily toward conduct outside the penumbra of the First Amendment, then standing is accorded to the accused to raise the overbreadth issue only if his conduct is arguably protected by the First Amendment. Here appellee was, of course, not convicted for anything he said (cf. *Street* v. *New York*, 394 U.S. 576 (1969)) in his talk at Boston University. His right to communicate was not in any way interfered with.

In *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Terminiello* v. *Chicago*, 337 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415; *Edwards* v. *South Carolina*, 372 U.S. 229; *Baggett* v. *Bullitt*, 377 U.S. 360; *Cox* v. *Louisiana*, 379 U.S. 536; and *Dombrowski* v. *Pfister*, 380 U.S. 479—the statutes, either as written, or as authoritatively construed by the highest court of the particular jurisdiction, bore directly and indiscriminately on First Amendment activities. Moreover, in each of the above cited cases, with the possible exception of *Thornhill* and *Dombrowski*, a determination was made by this court that the conduct engaged in by the complaining party was that sort of conduct which normally enjoyed First Amendment protection.

The offense for which he was prosecuted and convicted was that he, not being a professional designated by the statute, gave away a contraceptive device.

We think it clear beyond any doubt that a legislature has the authority—indeed, the duty—to limit the practice of medicine to registered physicians. See *Watson* v. *Maryland*, 218 U.S. 173 (1910); *Reetz* v. *Minnesota*, 188 U.S. 505 (1903). This is particularly applicable where, as here, the legislation concerns, inter alia, the distribution of medicinal devices and formulae, the effects of which are still subject to considerable debate. In the present case, appellee never made a showing in the state courts or in the courts below that he was a licensed physician, or, indeed, that he was otherwise qualified to prescribe these devices. In these circumstances, petitioner is in no position to argue that the statute was unconstitutionally applied to him.

Consistent with his avowed purpose of mounting a broadside challenge to the statute, however, he has made a number of points that are, as to him, purely hypothetical. That the recipient of the foam was in this instance an unmarried person is irrelevant. He would as well have been guilty of the offense had he given it away to a married person. The statutory distinction between married and unmarried persons as recipients relates only to the situation where the designated professionals are the givers, and has no bearing upon the appellee who, not being such, is guilty of the crime regardless of the marital status of the recipient. Indeed, for aught that Mr. Baird knew, the person to whom he gave the Emko foam might well have been a married woman.

Even assuming that the statute in its present form violates some right of privacy because it deprives unmarried persons of access to contraceptive devices, that claim is not appellee's to make. He is not an unmarried person, and he has never asserted that he has been denied access to

contraceptive devices by operation of the statute. See *United States* v. *Raines*, 362 U.S. 17, 21 (1912); *Yazoo & Mississippi Valley Railroad Co.* v. *Jackson Vinegar Co.* 226 U.S. 217 (1960); *LeClair* v. *O'Neil*, 307 F. Supp. 621, 624, appeal affirmed, 39, 3420 (3/30/71).

No interest of his as an unmarried person was invaded, nor was the privacy of his marriage intruded upon. In each of these aspects his arguments are hypothetical.

Nothing in *Griswold* is to the contrary. In that case, one appellant was the executive director of the Planned Parenthood League, and the other was a licensed physician. With respect to standing, the court noted that both enjoyed a professional relationship with persons who could raise the issue, and thus, that standing was established. Secondly, and more importantly, the statute under challenge prohibited the use of contraceptive devices by married persons and the appellants were charged as aiders and abettors with respect to the violation of that statute. The court thus noted that they—as aiders and abettors—were entitled to raise the same defenses that could be raised by the principal.

In any event, *Griswold* is not applicable to the present case. In that case, the court merely held that a state statute which forbade the use of contraceptive devices by married persons, and which, in its enforcement, necessitated governmental excursion into the privacies of the marital relationship, was in conflict with the United States Constitution. Neither defect is present here. The antidistribution statute does not punish the use of contraceptive devices by any person. Nor does it involve governmental exploration into the privacies of the marital relationship, since as pointed out above, Massachusetts General Laws, c. 272, § 21A, specifically provides that married persons may receive and use contraceptive devices from any registered physician, or from any registered pharmacist upon presentation of a

prescription from a registered physician. Moreover, as pointed out above, the statutory scheme also limits distribution to registered physicians and pharmacists, and nothing in *Griswold* indicates that a state cannot properly limit the distribution of drugs and medical aids to properly trained personnel.

This court has long adhered to the notion that it "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion), and cases cited. If there are potentially unconstitutional applications of the Massachusetts statute, which we do not envisage, it will be time enough to consider them if prosecutions are undertaken and only after the Massachusetts courts, as courts of first instance, have had opportunity to pass upon such application of the statute. The claim that the statute may be abused should not be entertained at the instance of one whose conduct is not even arguably protected by the First Amendment.

Prescribing medication obviously necessitates speech, but the First Amendment does not prevent a state from limiting practice to qualified professionals. If the appellee, or nonprofessionals in the future, are deterred by this conviction from practicing in this regard, certainly no protected speech has been impaired. The circuit court's ruling in effect permitted appellee to assert rights, the assertion of which this court has found to be warranted only in the context of certain First Amendment cases, where departure from the normal rule of testing the validity of statutes as applied is deemed justified by the need to curtail the "chilling effect" of such a statute on the rights of free expression of third parties. See, *e.g.*, *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-489; *Thornhill* v. *Alabama*, 310 U.S. 88, 96-98. No protected speech is involved.

II. The Conduct for which Appellee was Convicted was within the Power of Massachusetts to Punish.

1. It is a function of the legislature, not the courts, to determine the need, desirability or utility of legislation absent a specific constitutional provision. Therefore, it is not the responsibility of the courts, through the Due Process Clause, to void laws thought to be "unwise or incompatible with some particular economic or social philosophy," *Ferguson* v. *Skrupa*, 372 U.S. 726, 729. Compare, formerly, *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915); *Adkins* v. *Children's Hospital of the District of Columbia*, 261 U.S. 525 (1923); *Jay Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924), with the prevailing view that no longer is it permissible to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. See *West Coast Hotel* v. *Parrish*, 300 U.S. 379; *Olsen* v. *Nebraska*, 313 U.S. 236; *Williamson* v. *Lee Optical of Oklahoma, Inc.* 348 U.S. 483. As Mr. Justice Black noted in *Ferguson*, *supra*, at 730,

> "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The constitutionality of Massachusetts General Laws c. 272, §§ 21, 21A, is not measured, then, by the belief "that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our notions of 'civilized standards of conduct.'" *Griswold* v. *Connecticut*, 381 U.S. 479, 513 (Mr. Justice Black dissent-

ing). For as this court has noted, it does not sit as a "super-legislature" to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421.

In short, then, there is nothing in the generality of the Due Process Clause that empowers this court to nullify the deliberate choices of the elected representatives of the people of Massachusetts. See *Labin* v. *Vincent*, 39 L.W. 4344, 4346. If there has been an abuse of power by the legislative, "the people must resort to the polls, not to the courts," *Munn* v. *Illinois*, 94 U.S. 113, 134.

2. "The Commonwealth has a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences," *Commonwealth* v. *Baird*, 355 Mass. 746, 753, except as authorized by statute. Such a policy is justified by the Commonwealth's right to protect the health of its citizens. Medical authorities indicate that professional advice is needed at the outset, in order to determine the best method of contraception to be employed, and to insure its suitability.

> "There is no one 'best method' to prevent conception. The effectiveness of any contraceptive measure depends not only on its degree of protection against pregnancy but also on how well the measure suits the couple utilizing it. Contraception involves social as well as biological factors. The advice of an interested doctor should be sought to help the couple select the contraceptive method that will be most effective for them." Robert J. Damarest and John J. Sciarra, Conception, Birth and Contraception, a Visual Presentation (p. 90).

"A careful history, a complete physical examination, including a pelvic exam and cytologic smears should be done before any method of contraception is prescribed. Each patient must be carefully individualized . . . A close, adequate follow-up every four to six months is equally important." Elizabeth S. Waugh, M.D., Preventive Measures and Problems of Negative Selection, "Journal of the American Medical Women's Association," vol. 23, No. 9, September, 1968, p. 807.

Medical expertise is likewise necessitated by the fact of possible medical side-effects of contraceptive devices, regardless of the method of contraception chosen.

Spermicidal vaginal preparations contain a chemical that will kill sperm or make them incapable of penetrating cervical mucus. These preparations are available in various forms including foams. Conception, Birth and Contraception, a Visual Presentation, *supra*, at 96. Certain women may be allergic to some of these products. Itching, irritation, wetness, or discharge may result from their use. Planned parenthood, "Choosing a Contraceptive, Vaginal Spermicides (foam, cream, jelly, suppository)." Despite the fact that Emko, the vaginal foam which the appellee was convicted of distributing, may be purchased without a prescription, such results may occur as a consequence of its use.

"Medical cautions . . .

"Irritation may occur. If it does discontinue use and consult your physician . . ." (Emko Instructions).

Although Baird was convicted of distributing Emko, the distribution of all contraceptives including the diaphragm, condom, intrauterine devices, and oral contraceptives is prohibited by the statute, except as authorized. Implicit in his distribution of Emko was a tacit recommendation that it

is to be preferred by the recipient to some other method of contraception. This recommendation calls for a professional judgment. The diaphragm, which requires fitting by a physician, generally causes no side effects, but if improperly fitted, is useless and painful. It is recommended that a woman return to the doctor once a year to be sure the diaphragm remains properly fitted, and to have a pap smear. Planned parenthood, "CHOOSING A CONTRACEPTIVE, The Diaphragm and Cream or Jelly."

The condom may sometimes cause irritation to the inner walls of the vagina. Planned parenthood, "CHOOSING A CONTRACEPTIVE, The Condom (safe, rubber, sheath)."

Intrauterine devices must be inserted by a physician. Discomfort or bleeding may result from their use, Conception, Birth, and Contraception, a Visual Presentation, *supra*, at 109, as well as cramps, backache, heavier menstrual flow, spotting and bleeding. Planned parenthood, "CHOOSING A CONTRACEPTIVE—the Intrauterine Device (IUD, Coil, Loop)."

This uncertainty, as to the side-effects of "the pill" so called, is perhaps best exemplified by the testimony of numerous medical authorities in hearings before the Senate Subcommittee on Monopoly of Small Business, early in 1970. There new evidence was outlined in detail to support links between oral contraceptive use and breast cancer, blood clots, diabetes, arteriosclerosis (Boston Globe, January 18, 1970, p. 1, col. 2), danger to the fetus in the form of extrachromosomes (Newsweek, January 26, 1970, p. 21, col. 3), adverse effects on fertility (New York Times, January 15, 1970, p. 1, col. 4) and potential long range mutagenic (mutation causing) effects (New York Times, January 15, 1970, p. 1, col. 4).

With the possibility of such effects being caused by the contraceptive devices mentioned, it, then, cannot be doubted that "The statutes in question have a clear relationship to the legislative purpose of safeguarding the health of the

community by placing the distribution of such substances exclusively in the hands of registered physicians and pharmacists. The statutes therefore can reasonably be regarded as furthering an important and substantial governmental interest." *Baird* v. *Eisenstadt,* 310 F. Supp. 951, 954. Under the circumstances, the state would be remiss in its obligations if it did not prevent distribution of contraceptive devices indiscriminately by nonprofessional persons.

3. While at one time the Massachusetts "birth control" law was absolute in its prohibitions, *Commonwealth* v. *Gardner,* 300 Mass. 372 (1938), *Griswold* v. *Connecticut,* 381 U.S. at 485, significantly restricted a state's right to use all means of birth control regulation reasonably related to effectuating the legislative purpose of protecting the public health and welfare. *Griswold* concerned itself with the zone of privacy created by the marital relationship. It recognized that once a state acknowledged a marriage and the intimacies inherent in it, it may not undertake to regulate by means of the criminal law the details of that intimacy (381 U.S. at 499). Likewise, the court recognized that the Connecticut law which forbade the *use* of contraceptives by *married persons* had the effect of injecting the state into the "sacred precincts of marital bedrooms" thereby having a maximum destructive impact upon the relationship, at 485.

The court, therefore, found that the Connecticut statute violated the familiar constitutional principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U.S. 288, 307. Yet, while *Griswold* recognized the sanctity of the marital relationship, the intimacies in-

herent in it and the consequent limitation of a state's power to regulate the relationship, it clearly distinguished such a situation from the one here involved, that is, the distribution of contraceptives to unmarried persons, by one other than a physician. The court acknowledged as "beyond doubt" the right of the state "to enact statutes regulating the private sexual lives of single persons" (381 U.S. at 498.

Since 1879, when the Massachusetts legislature enacted this statute it has been a crime to distribute contraceptives. This statute was enacted under the police powers of the state and represents a law within this power to protect both morals and health. It is fatuous to argue that a law limiting distribution of contraceptives to the married does not bear a reasonable relationship to morals. The success or lack of success which such law has on the protection of morals should not be the measure of its constitutionality.

What radical change has occurred in the society in which we live to make such a law now unconstitutional? Have people acquired rights to extra-marital relations free of any public and criminal responsibility? If so, what becomes of our laws against fornication and adultery?

The Massachusetts Supreme Judicial Court said in *Commonwealth* v. *Allison*, 227 Mass. 57 (1917), at p. 62:

> "The statutes under which the several counts in this indictment are drawn contravene no provision of the constitution. Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the State."

Nothing relevant to this issue has occurred since 1917 to change the legislative purposes as delineated in *Commonwealth* v. *Allison, supra*. This statute is still designed "to promote the public morals." Its purpose in protecting purity and chastity is still viable in 1970 and even perhaps much more necessary than in 1917.

The court below has adopted the specious argument of Baird that there is some "right" of the unmarried to have sexual intercourse free of unwanted pregnancy. Such a right does not exist except by an attempted judicial fiat. *Poe* v. *Ullman*, 367 U.S. 497, 553.

If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional.

The presumption of validity in favor of the statute places the burden on Baird to demonstrate its unconstitutionality. While Baird frequently refers to the rising rate of illegitimacy, he is conspicuously silent on statistics which might prove that the free and lawful distribution of contraceptives has reduced the rate of illegitimacy in those states which permit such distribution. The burden is his, not ours. In a word, Baird has failed to show that the statute does not bear a reasonable relationship to a proper object of legislative concern.

The court below attempted to ridicule the "health argument" by asserting the "right" of the unmarried to the same professional assistance of physicians as afforded the married, and by characterizing the denial of professional help to the unmarried, "grossly discriminating." This argument is fallacious because it is predicated on the totally untenable ground that the unmarried have a "right" to indulge in the act of sexual intercourse which creates the need for professional contraceptive advice. This right just does not exist.

One might think after reading the opinion of the court below that an unmarried person required this type of pro-

fessional advice and service as a result of accidentally contracting typhoid fever or diptheria. It becomes important to remind ourselves that an unmarried person needs this type of professional advice only if he violates or contemplates the violation of the law.

Massachusetts General Laws, c. 272, §§ 21, 21A, by their very terms, deal only with regulating the dissemination of contraceptives to the unmarried. While prior to 1966, and the statute unequivocally outlawed the distribution of birth control information to any class of individuals, married or unmarried, the legislature eliminated any overbreadth by enacting sec. 21A, in response to *Griswold*.

The statute now, therefore, does not sweep into any rights of privacy guaranteed to married persons. It merely regulates the sexual conduct of single persons, who do not share in the same rights of the married, as enunciated in *Griswold*. The Massachusetts Supreme Judicial Court also made the distinction:

> "The *Griswold* case and the ensuing statutory amendments . . . did not enlarge the group who might be so informed or thus provided. Unmarried individuals are still excluded." *Commonwealth* v. *Baird*, 355 Mass. 746, 749 (1969).

Conclusion.

For the above reasons, appellant submits that Massachusetts General Laws, c. 272, §§ 21, 21A, be upheld in their particular application to the appellee, that the decision of the Court of Appeals be reversed and that of the United States District Court be reinstated.

Respectfully submitted,

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